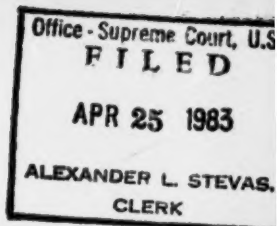


NUMBER 82-1625
SUPREME COURT OF THE
UNITED STATES OF
AMERICA



RALPH BOUMA and
MRS. RALPH BOUMA

Petitioners

vs

ON PETITION FOR
WRIT OF CERTIORARI
FROM THE SUPREME
COURT OF THE STATE
OF MONTANA

LARRY C. IVERSON, INC.

Respondent

PETITIONERS' RELPY BRIEF

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INTRODUCTION

The facts were outlined in the Petition for a Writ of Certiorari. This brief is in reply to the Respondent's Reply Brief. Mr. and Mrs. Ralph Bouma are referred to as the "Buyers". Larry C. Iverson, Inc., the Seller under a land exchange contract, is referred to as "the Corporation"

ARGUMENT

I. THE FIRST DECISION OF THE MONTANA SUPREME COURT, APPENDIX B, REPORTED AT 639 P. 2d 47 WAS NOT A "FINAL JUDGMENT" WITHIN THE MEANING OF TITLE 28 U.S.C SECTION 1237. THAT DECISION AND THE PROCEDURE LEADING TO IT MAY BE REVIEWED BY THE UNITED STATES SUPREME COURT.

This case involved two appeals to the Montana Supreme Court. First, the trial court, granted summary judgment to the Sellers on the contract for deed and provided an accounting. Both sides appealed. The Montana Supreme Court reversed for a new accounting. The Trial Court held a hearing and provided a new accounting. The Buyers appealed that decision. The Buyers petition for a writ of certiorari.

If a state appellate court reverses a trial court for a new accounting, then that appellate court decision is not a final judgment, see cases collected at 29 L. Ed 2d at 887, Section 7(a). In this case, the Montana Supreme Court ordered a new accounting, Appendix B, Petition for Writ of Certiorari, at 89-93. The first appellate decision was not a final judgment.

The Corporation argues that the Buyers started to seek a Writ of Certiorari by asking Justice Rehnquist for a stay in the first appeal. The stay was denied. The Buyers discontinued their attempt to obtain a writ of certiorari when Judge Langen issued the new accounting. It was an appealable order under Montana State Rules; it would be followed by a final judgment of the Montana Supreme Court.

The Corporation cites no cases that hold that when a state appellate court orders an accounting that that decision is "final" within the meaning of Title 28 U.S.C. Section 1257

so as to preclude review of errors made prior to that decision. In both F.T.C. vs. Minneapolis -Honeywell R. Co. (1952) 344 U.S. 206, 97 L. Ed. 245, 73 S. Ct. 245 and Department of Banking vs. Pink (1942) 317 U.S. 264, 87 L. Ed 257 the Court held that a post - judgment motion was not a motion for a rehearing which would extend the time for a petition for writ of Certiorari. Neither was a decision where a state appellate court reversed a lower court for an accounting.

Further, there is a strong policy reason not to hold this petition to be untimely. The Corporation suggests that the first decision was subject to a petition for writ of certiorari. The prevailing case law says it was not. There was no way the Petitioners knew if it was or not, except by petitioning. The result would be two petitions for a writ of certiorari for one case. This would create additional work for an already over burdened Court.

The better procedure would be to exhaust all state appeals. This would be by holding the accounting and appealing that decision. This would result in one petition for a writ of certiorari on the case.

In summary, the first decision of the Montana Supreme Court was not final. This is because an accounting was ordered. All errors in this case may be reviewed by this petition for a writ of certiorari.

II. THE PETITION FOR A WRIT OF CERTIORARI IS NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL.

The Corporation argues that the Buyers brought a Civil Rights action based upon Title 42 U.S.C. Sections 1983, 1985 and 1986. Since that action was dismissed, all the Buyers due process claims are barred by collateral estoppel or res judicata. It cites no cases or other authority for this assertion (Respondent's Brief in Opposition at 11-12).

Res judicata is a bar only if the same claim is brought a second time, Cronwell vs. County of Sac (1876) 94 U.S. 351, 24 L. Ed.

195. In this case, the Corporation brought a civil action to void a contract for deed. The Buyers alleged defenses which included due process violations. Eventually, the Buyers brought a civil rights action under Title 42 U.S.C. Sections 1983, 1985 and 1986. They claimed that the procedural violations amounted to actionable conduct under those section.

The 9th Circuit Court of Appeals disagreed, Appendix B, Respondent's Brief in Opposition. Effectively, it held that such violations did not state a cause of action under the Civil Rights Act. Such violations may be reviewed by the United States Supreme Court by a Petition for a Writ of Certiorari, Reynolds vs. State of Georgia (5th Cir., 1981) 640 F. 2d 702; County Club Tower Corp. vs. Tower Management (D. Mont., 1967) 275 F. Supp. 468.

Furthermore, the Corporation never raised the defenses of collateral estoppel or res judicata. Such theories are affirmative defenses which must be pleaded or are waived, Rule 8(c).

Montana Rules of Civil Procedure and Federal Rules of Civil Procedure. Since these arguments were not raised before, they have been waived.

In summary, the Corporation cites no authority for its argument that the Buyers Petition is barred by collateral estoppel and res judicata. Since the causes of action in the state civil action and the federal civil rights action were not the same, the Petition is not barred. The Corporation failed to raise these arguments earlier so they are waived.

III. THE PAYMENT OF THE DAMAGES AWARDED BY THE MONTANA SUPREME COURT DOES NOT MOOT THE QUESTION OF WHETHER SUCH DAMAGES WERE AWARDED IN VIOLATION OF DUE PROCESS.

The Montana Supreme Court awarded the Corporation \$500.00 in damages on appeal. This was done without any notice or opportunity to be heard. The Buyers asked the Montana Supreme Court and the United States Supreme Court for a stay of this order. The stay was denied. The Buyers paid the award.

The Corporation argues that the award of

\$500.00 is moot. This is because it has been paid.

"There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money." Dakota Co. vs. Glidden (1885) 113 U.S. 222, 224, 28 L. Ed. 981, 982, 5 S.Ct. 428. The payment of the damage award by the Buyers does not moot the issue of whether the award violated due process.

The Corporation cites Priser, Comm. vs. Newkirk (1975) 422 U.S. 395. In that case, a prisoner was transferred from a medium security prison to a higher security prison without notice or hearing. He brought a civil action for injunctive and declaratory relief. Before a final decision was reached the prisoner was transferred to a minimum security prison. The Supreme Court held the case to be moot.

Priser did not involve the payment of damages after judgment but before an appeal was decided. It is not on point.

The issue of whether damages on appeal were awarded in violation of due process is not moot. The Supreme Court may review this issue.

IV. THE PETITION FOR A WRIT OF CERTIORARI PRESENTS SIX SUBSTANTIAL INDEPENDENT FEDERAL QUESTIONS. THE SUPREME COURT COULD GRANT CERTIORARI ON ANY ONE OF THEM.

a. THE BUYERS WERE BOUND BY A PRIOR COURT ACTION OBTAINED BY FRAUD TO WHICH THEY WERE NOT A PARTY. THEY WERE NOT ALLOWED TO RAISE THIS DEFENSE.

The Corporation argues that the Buyers were not bound by a court decision in which they had a legitimate interest. This is not correct.

The Buyers were bound by part of the decision in United Bank of Pueblo vs. Iverson consolidated with Farmers State Bank of Conrad vs. Iverson Numbered 8221/8073, Appendix F. This was specifically stated by the Montana Supreme Court in its opinion, Appendix B at 56, 61, and 73. If the Buyers were bound by that decision to certain findings, then they had an interest in the case. They were not a party to that case.

b. THE CORPORATION FAILED TO ANSWER FEDERAL QUESTION NUMBER 2.

The Corporation made no argument as federal question number 2. This argument is unrefuted.

c. THE FACT THAT THE BUYERS WERE GIVEN A HEARING ON THE MOTION TO DISQUALIFY JUDGE LANGEN DOES NOT MEAN THE FAILURE TO DISQUALIFY HIM DID NOT VIOLATE DUE PROCESS.

The Corporation argues that a hearing was held on the disqualification of Judge Langen. For this reason, the failure to disqualify him did not violate due process.

The reasons for disqualifying Judge Langen are stated in the Petition for a Writ of Certiorari at 35-40. The reasons are not that a hearing was not held. The reasons are that Judge Langen was so biased and prejudiced that due process was violated if he remained on the case. This argument is unanswered by the Corporation.

d. THE MONTANA SUPREME COURT'S DECIDING THIS CASE VIOLATED DUE PROCESS.

The Corporation argues that Ralph Bouma's affidavit seeking a grand jury and the Buyers' Civil Rights Complaint were voluntary acts. For this reason, they could not be the basis of dis-

qualifying the Montana Supreme Court.

In this case, Ralph Bouma sought to keep the grand jury affidavit secret. This is required by state law, Section 46-11-317, Montana Codes Annotated. Despite this attempt, the affidavit was made public.

The cases cited by the Corporation are not on point (see Brief in Opposition at 15). They do not involve a person who tried to keep secret an application for the impaneling of a grand jury. Ralph Bouma tried to have the Montana Supreme Court Justices remain unbiased. His efforts were unsuccessful.

Furthermore, the Corporation used Ralph Bouma's grand jury affidavit at oral argument, Appendix J, at 243 - 245. The affidavit was completely irrelevant to the validity of a land exchange contract. Yet, the attorneys for the Corporation were allowed to incense and emotionalize the court by referring to it during oral argument.

In this case, the Justices of the Supreme Court were named in a federal law suit brought

by the Buyers. This fact is stated in their opinion, Appendix B at 52. The justices were obviously influenced by this fact.

Johnson vs. Mississippi (1971) 403 U.S. 212 29 L. Ed 2d 423, 91 S.Ct. 1778 prevents judges who are enmeshed with a party from sitting on a case. The justices of the Montana Supreme Court were so enmeshed they should have been disqualified from the proceeding. Their judgments 639 P. 2d 47 (Appendix B) and Appendix D should be vacated for this reason.

e. THE MONTANA SUPREME COURT DENIED RALPH BOUMA DUE PROCESS OF LAW BY REFUSING TO ALLOW HIM TO ARGUE HIS CASE.

The Corporation argues that the right to self-representation in civil matters has never been established under federal constitutional law by the United States Supreme Court. This is true. Three federal circuit courts of appeals have recognized it (see cases, Petition for Writ of Certiorari at 44). Only in Montana is there no such right.

To end this disagreement between the Montana Supreme Court and the federal courts of

appeal the United States Supreme Court should accept certiorari. This case clearly presents the chance to extend the right of self-representation in civil matters in state courts under the 14th Amendment's due process clause.

The Corporation argues that a person has no right to oral argument. This is true but is not the issue. The issue is whether one party may be allowed oral argument because it is represented by an attorney while the other party is denied oral argument because he does not have an attorney.

This is a violation of the 14th Amendment's due process clause. Also, it violates the 14th Amendment's equal protection clause. Section 37-61-416, Montana Codes Annotated, states, "A party to a civil action who is of full age may ... defend the same in person..." To allow Ralph Bouma to defend his case before the trial court but not in the Montana Supreme Court violates the equal protection clause of the 14th Amendment.

Furthermore, the Montana Supreme Court had

told Ralph Bouma that he would have to argue his case without his wife's attorney. In Campanella vs. Bouma (1967) 164 Mont. 217, 520 P. 2d 1073, the Montana Supreme Court quoted, approvingly, language from the trial court. It said, "In the future, counsel for Mrs. Bouma will not be permitted to argue or otherwise participate in instances where she has no more than a tangential interest and Mr. Bouma has the direct interest." 520 P. 2d at 1075. Without any notice, the Montana Supreme Court reversed itself and refused to allow Mr. Bouma to be heard.

The Corporation argues that Ralph Bouma was not prejudiced by requiring Gustafson to argue his case. This is not true. Gustafson came to oral argument prepared only to argue the case for his client, Mrs. Ralph Bouma. Gustafson's ineffectiveness was demonstrated in Appendix J at 243. On that page, Justice Morrison is quoted as saying, "Now, Mr. Gustafson, what has all this got to do with the issues before the court."

Finally, the Corporation argues that a prisoner representing himself has no right to appear at oral argument, Price vs. Johnston (1948) 334 U.S. 266. In Price, the court was concerned with disruption of the prison system. In this case, Ralph Bouma was not an inmate of a prison. There would be no disruption. Further, the Court in Price did not say a prisoner may be denied oral argument while the state is allowed it. Price is not on point.

In summary , this case clearly presents to the United States Supreme Court the question of whether the due process clause extends to persons in civil cases the right to self-representation. Also, the question of whether the equal protection clause requires a person representing himself all the procedural rights of a person represented by counsel is presented. These are important federal questions where the Montana Supreme Court conflicts with several federal circuit courts of appeal. The United States Supreme Court should accept certiorari to decide these issues.

f. THE MONTANA SUPREME COURT DENIED THE BUYERS DUE PROCESS OF LAW BY IMPOSING DAMAGES ON APPEAL OF \$500.00 WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD.

The Montana Supreme Court imposed damages of \$500.00 against the Buyers on appeal. The Corporation did not ask for this relief. The Montana Supreme Court did not say that they were considering such relief.

The Corporation argues that the Buyers were given notice by Rule 32, Montana Rules of Appellate Civil Procedure. This rule does provide for damages on appeal. But, having a rule to provide for damages does not eliminate the need for notice of invoking a rule. If this was the case, a person would not be required to give notice in civil actions. The existence of a statute would be adequate for recovery. The Corporation's argument is so untenable that it cites no authority for its position.

In summary, an important federal question is presented for review. It is whether a State Appellate Court denies due process by imposing damages on appeal without any notice or

opportunity to be heard. The purpose of such notice would be to give Boumas a chance to present mitigating circumstances, Groppi vs. Leslie (1972) 404 U.S. 496, 30 L. Ed 2d 632, 92 S. Ct. 582. The Supreme Court should grant a writ of certiorari in this case.

CONCLUSION

The first decision of the Montana Supreme Court affirmed the trial court and reversed in part ordering an accounting. It was not a final judgment or decree. As such, it was not reviewable by the United States Supreme Court.

Further, the questions for review are not barred by res judicata or collateral estoppel. The Corporation cites no authority for this position. The Corporation did not raise this argument in any state court.

In addition, the payment of damages on appeal does not moot the question of whether the award of damages without notice or hearing violates due process. The Corporation cites no authority for this position.

Finally, the Corporation has not substantially refuted any of the six federal questions presented for review. The Court should grant the writ of certiorari on all or any of the federal questions raised.

Respectfully submitted.

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CERTIFICATE OF MAILING

We certify that on April 22, 1983, that
three copies of the Petitioners' Reply Brief
~~_____~~ were mailed
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